Nos. 87-1614, 87-1639 and 87-1668

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN W. MARTIN, *et al.*,
Petitioners
v.
ROBERT K. WILKS, *et al.*,
Respondents

RICHARD ARRINGTON, JR., *et al.*,
Petitioners
v.
ROBERT K. WILKS, *et al.*,
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PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA, *et al.*,
Petitioners
v.
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Respondents

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

The Equal Employment Advisory Council (EEAC), with the written consents of the parties,[1] respectfully submits this brief amicus curiae in support of the petitioners, urging reversal of the decision of the court of appeals below.

INTEREST OF THE AMICUS CURIAE

EEAC is a nationwide association of employers organized to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a broad segment of the business community. Its governing body is a Board of Directors composed of experts in equal employment opportunity and affirmative action. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as the legal aspects of equal employment opportunity programs and requirements. The members of EEAC are firmly committed to the principles of nondiscrimination and equal employment opportunity.

EEAC's members are employers subject to Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e, *et seq.*, as well as other equal employment statutes and regulations. Most are also subject to the affirmative action requirements of Executive Order 11246, 30 Fed. Reg. 12319 (1965), *as amended* by 32 Fed. Reg. 14303 (1967) and 43 Fed. Reg. 46501 (1978). In addition, a number of EEAC's members are parties to consent decrees settling charges of discrimination under Title VII and other federal and state equal employment statutes, regulations and orders.

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[1] Letters of consent have been filed with the Clerk of the Court.

At issue in this case is the extent to which the federal courts will permit collateral attacks on Title VII consent decrees by persons who have not made timely efforts to intervene in the underlying Title VII litigation. The Court's resolution of this issue could seriously affect the utility of consent decrees as a means of resolving class claims of discrimination in employment, since much of the incentive to an employer to enter into such a decree would be destroyed if the employer were left vulnerable to subsequent lawsuits by persons or groups claiming that the employer's compliance with the consent decree constituted discrimination against them.

Because of its interest in this issue, EEAC was granted leave to file a brief amicus curiae in *Marino v. Ortiz*, 108 S. Ct. 586 (1988), in which the Court divided evenly on this issue. EEAC also has participated in other cases involving Title VII consent decrees, as well as many other procedural aspects of Title VII. *E.g.*, *Local Number 93 v. City of Cleveland*, 106 S.Ct. 3063 (1986) (validity of Title VII consent decree providing class-based affirmative action relief); *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981) (appealability of district court's order rejecting proposed consent decree); *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982) (preclusive effect of state court judgment on later Title VII claim based on same facts); *United Air Lines v. Evans*, 431 U.S. 553 (1977), and *Delaware State College v. Ricks*, 449 U.S. 250 (1980) (effects of Title VII time limitations for filing charges). In this brief, EEAC urges reversal of the decision below permitting a collateral attack on a consent decree by persons who had notice and opportunity to intervene

in the underlying Title VII litigation, but did not make a timely motion to do so.

STATEMENT OF THE CASE

The history of these proceedings is summarized in the decisions below and need not be reiterated at length here. The pertinent facts for purposes of this amicus curiae brief are as follows:

In 1979, after litigating for several years over complaints of discrimination in their employment practices, the City of Birmingham and the Jefferson County Personnel Board entered into negotiations with the United States, the Ensley Branch of the NAACP, and several individual black plaintiffs for the purpose of settling various consolidated cases. By 1981, the parties had reached agreement on language of two proposed consent decrees, one to be binding on the City and the other on the County Personnel Board. The proposed decrees included both long-term and interim annual goals for the hiring and promotion of blacks and women to positions as firefighters, fire lieutenants and other classifications.

Notice was then published in two local newspapers inviting "all persons who have an interest which may be affected by the Consent Decrees" to appear at a fairness hearing where they could present any objections they might have to the decrees. Similar notice was given by mail to the members of the subclasses alleged to have been discriminated against.

Among those who appeared at the fairness hearing and made arguments were the Birmingham Firefighters Association (BFA) and two of its members, represented by Raymond P. Fitzpatrick, Jr.,

Esq., counsel for the "reverse discrimination" claimants in this case. Mr. Fitzpatrick argued at the hearing that the decrees' race-conscious relief violated Title VII and the Fourteenth Amendment. He was invited by the court to present evidence in support of his objections, but he declined to do so.

After the fairness hearing but before the final approval of the decrees, Mr. Fitzpatrick's clients moved for the first time to intervene in the proceedings. The district court, in a ruling later upheld on appeal and not challenged here, denied the motion to intervene as untimely. Thereafter, on August 18, 1981, the court entered a final order approving the two decrees.

When the City announced the first promotions of black employees pursuant to the decrees, several competing white employees (all members of the BFA) represented again by Mr. Fitzpatrick, brought suit against the City and the Personnel Board in the district court, claiming "reverse discrimination" and seeking a preliminary injunction to halt enforcement of the decrees. When the court denied the preliminary relief they sought, these plaintiffs brought suit on the merits, claiming that the City and the Board were discriminating against them by certifying and promoting black candidates whose qualifications, they asserted, were inferior to theirs. Similar "reverse discrimination" complaints were filed in the district court by several other white City employees and their representatives and by the United States.

The district court consolidated all of the "reverse discrimination" actions, and thereafter, the plaintiffs from the original proceedings that had led to the consent decrees intervened as defendants in this con-

solidated litigation to defend the decrees. After a limited trial, the district court granted a motion to dismiss, holding that the plaintiffs' claims amounted to impermissible collateral attacks on the consent decrees, since the promotions they challenged were required by the decrees.

On appeal, a divided panel of the Eleventh Circuit reversed the district court's ruling dismissing the action. The majority reasoned that because the individual plaintiffs in the "reverse discrimination" actions "were neither parties nor privies to the consent decrees, . . . their independent claims of unlawful discrimination are not precluded." *Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492, 1498 (11th Cir. 1987).

SUMMARY OF ARGUMENT

Eight federal circuits have expressly or implicitly adopted the rule that collateral attacks on consent decrees settling employment discrimination suits are impermissible, and that the proper course for a person seeking to challenge such a decree is to intervene in the lawsuit underlying the decree itself.[2] This

[2] The decisions are tabulated by circuit in footnote 5, *infra* at p. 11.

We include in this list the Seventh Circuit, which endorsed the majority rule against collateral attacks in the employment discrimination context in *Grann v. City of Madison*, 738 F.2d 786, 794-796, *cert. denied*, 469 U.S. 918 (1984). Other briefs herein have ranked the Seventh Circuit along with the Eleventh as favoring the view that permits collateral attacks on consent decrees, citing *Dunn v. Carey*, 808 F.2d 555 (7th Cir. 1986). That case, however, did not involve a decree settling employment discrimination claims. Rather, it addressed whether a state court suit by taxpayers challenging a county

procedure makes good, practical sense. It enables the court to hear and take account in a single proceeding of the arguments and objections of all those claiming to be affected, before deciding whether to approve, disapprove or modify a consent decree. It also cuts down on forum shopping in search of a judge who may disagree with the first judge's resolution of the issues. As a result, all parties, intervenors and the court benefit from the finality, certainty and efficiency of the judicial procedure. Only one circuit, the Eleventh, has rejected this approach in an employment discrimination case.[3]

The majority rule precluding collateral attacks on consent decrees in employment discrimination cases draws powerful support from Title VII's basic policy of promoting voluntary resolution of charges of dis-

government's agreement to build a new "Public Safety Complex" including a new city hall, police facilities and a new jail, was barred because the agreement was embodied in a consent decree settling a federal court class action by prisoners who claimed that conditions at the old jail violated the constitutional rights of pretrial detainees. The Seventh Circuit held that the taxpayers' suit was not barred, noting that the taxpayers were not parties to the consent decree, and that their right to challenge the county's authority to enter into the agreement to build the new complex could not be cut off without their participation. The court did not discuss whether the taxpayers had had any opportunity to intervene in the federal court action before the entry of the consent decree. Nor did the court make any reference to its earlier decision in *Grann v. City of Madison*.

[3] The Eleventh Circuit decisions are cited at footnote 7, *infra* at p. 13. *See also Ashley v. City of Jackson*, 464 U.S. 900 (1983) (Rehnquist, J., dissenting from denial of *certiorari*) ; and *see* footnote 2, *supra*.

crimination.[4] The understanding that a consent decree will not be subject to subsequent collateral attacks is typically an important part of the employer's incentive to give its consent to this form of settlement. One of the main benefits an employer can derive from such a decree is a final end to litigation over its challenged employment practices. Similarly, the benefits that flow to the courts and to the EEOC from such decrees through reduction of caseload pressures are substantially dependent on the decrees' finality.

The majority rule also derives strong support from the important policies of efficiency and consistency of judicial results that underlie the legal doctrines of preclusion and comity. As the court observed in *Prate v. Freedman*, 430 F. Supp. 1373, 1375 (W.D.N.Y.), *aff'd mem.*, 573 F.2d 1294 (2d Cir. 1977), *cert. denied*, 436 U.S. 922 (1978), "To permit [collateral attack on a consent decree] would . . . result in continued uncertainty for all parties involved and render the concept of final judgments meaningless."

The concerns that prompted the Eleventh Circuit to reject this majority rule, and then-Associate Justice Rehnquist to question it in his opinion dissenting from the denial of *certiorari* in *Ashley v. City of Jackson* warrant serious consideration, but do not ultimately support reversal of the decision below in this case. Justice Rehnquist observed that it would be a denial of due process to make a decree binding on a litigant who "has never had an opportunity to

[4] This important federal policy is discussed in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974), and *Carson v. American Brands, Inc.*, 450 U.S. 79, 83 n.15 (1981).

be heard." 464 U.S. at 257. The Eleventh Circuit similarly expressed concern that the majority rule "deprives a nonparty to the decree of his day in court to assert the violation of his civil rights." *United States v. Jefferson County*, 720 F.2d 1511, 1518 (11th Cir. 1983).

These criticisms assume that the persons seeking to challenge the decree were not given adequate notice of the litigation leading to the decree or of its potential effects on their interests, or were not afforded a fair chance to intervene in those proceedings to protect their interests. Such is not usually the case, however, where employment discrimination consent decrees are concerned. Rather, the case at bar is typical of most employment consent decree cases, in that timely notice of the proposed decree was given to "all persons who have an interest which may be affected by the Consent Decree." In these circumstances, the right of any potentially affected persons to intervene in the decree litigation by timely motion under Rule 24, Fed. R. Civ. P., gives them sufficient opportunity to have their "day in court" if they so desire.

The district court's refusal to allow the "reverse discrimination" claimants in this case to bring a collateral attack on the Title VII consent decrees could not be deemed a denial of due process. They had notice of the Title VII litigation, were fully aware of its potential impact on their interests, and were afforded ample opportunity to intervene therein. They simply delayed until too late before attempting to do so, and let their chance slip past.

This case, then, is much like *National Wildlife Federation v. Gorsuch*, 744 F.2d 963, 968-72 (3d Cir. 1984), wherein the Third Circuit upheld the dismissal of a collateral attack on a consent decree in an environmental case with an observation equally fitting here:

> Clearly, plaintiffs were not outsiders unaware of litigation in progress that would ultimately affect their interests. In a deliberate choice of litigation strategy, they chose to stand on the sidelines, wary but not active, deeply interested, but of their own volition not participants. Although plaintiffs may not have had their day in court as litigants, they had the opportunity and for reasons of their own adopted a different approach. Plaintiffs cannot, at this point, assert persuasively that the interest of finality should not prevail.

744 F.2d at 971-72. In these circumstances, due process does not require subordination of the interests of finality, consistency, efficiency and judicial economy that the majority rule barring collateral attacks is designed to promote.

ARGUMENT

A TITLE VII CONSENT DECREE SHOULD NOT BE OPEN TO ATTACK IN A LATER-FILED, COLLATERAL LAWSUIT BY PERSONS WHO HAD NOTICE AND AN OPPORTUNITY TO BE HEARD IN THE LITIGATION UNDERLYING THE DECREE BUT MADE NO TIMELY MOTION TO INTERVENE.

A. Intervention Provides a Practical Mechanism for Protecting the Interests of All Potentially-Affected Persons Without Impairing Title VII's Goal of Fostering Voluntary Resolution of Discrimination Claims.

As noted, at least eight circuits have either expressly adopted or implicitly endorsed the rule barring collateral attacks on consent decrees in employment discrimination cases.[5] In doing so, the courts

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[5] First Circuit: *Culbreath v. Dukakis*, 630 F.2d 15, 22 (1980) (dictum);

Second Circuit: *Marino v. Ortiz*, 806 F.2d 1144, 1146 (1986), *affirmed*, 108 S. Ct. 586 (1988); *Prate v. Freedman*, 430 F. Supp. 1373, 1375 (W.D.N.Y.), *aff'd mem.*, 573 F.2d 1294 (1977), *cert. denied*, 436 U.S. 922 (1978);

Third Circuit: *O'Burn v. Shapp*, 70 F.R.D. 549 (E.D. Pa.), *aff'd mem. sub nom. Lutz v. Shapp*, 546 F.2d 417 (1976), *cert. denied*, 430 U.S. 968 (1977); *c.f. National Wildlife Federation v. Gorsuch*, 744 F.2d 963, 968-72 (1984) (Third party collateral attack on consent decree under Environmental Protection Act held barred);

Fourth Circuit: *Goins v. Bethlehem Steel Corp.*, 657 F.2d 62, 64 (1981), *cert. denied*, 455 U.S. 940 (1982);

Fifth Circuit: *Thaggard v. City of Jackson*, 687 F.2d 66, 68-69 (1982), *cert. denied sub nom. Ashley v. City of Jackson, Mississippi*, 464 U.S. 900 (1983);

Sixth Circuit: *Stotts v. Memphis Fire Dep't*, 679 F.2d 541, 558 (1982), *rev'd on other grounds sub nom. Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Black*

have emphasized that those seeking to challenge the consent decrees in question could have moved to intervene in the underlying litigation and thereby made their objections known to the court in the context of the same action, rather than bringing separate lawsuits. *E.g., Thaggard v. City of Jackson*, 687 F.2d at 68; *Black & White Children of Pontiac v. School District of City of Pontiac*, 464 F.2d at 1030.

This procedure is eminently sensible. Intervention is liberally available in Title VII proceedings. Under Rule 24, Fed. R. Civ. P., anyone who claims an interest relating to the subject matter of a lawsuit and is "so situated that the disposition of the action may as a practical matter impair or impede [that person's] ability to protect that interest" has an unconditional right to intervene simply by making a timely application to the court, unless his or her interest is already adequately represented by an existing party. Fed. R. Civ. P. 24(a). Even where not available as an unconditional right, intervention is permitted in the court's discretion under Fed. R. Civ. P. 24(b) whenever "an applicant's claim or defense and the main action have a question of law or fact in common." Thus, any persons or groups that have reason to think their job rights might be affected by a consent decree in a Title VII action will ordinarily have an opportunity to participate in that litigation

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& White Children of Pontiac v. School District of City of Pontiac, 464 F.2d 1030 (1972);

Seventh Circuit: *Grann v. City of Madison*, 738 F.2d 786, 796, *cert. denied*, 469 U.S. 918 (1984); *but see Dunn v. Carey*, 808 F.2d 555 (1986), discussed at footnote 2, *supra.*;

Ninth Circuit: *Dennison v. City of Los Angeles Dep't of Water & Power*, 658 F.2d 694 (1981).

and make their interests known to the court, simply by making a timely application to intervene.[6]

This approach has manifest advantages over that followed in the Eleventh Circuit, where individuals who have failed to seek timely intervention to challenge a Title VII consent decree are permitted to "institute an independent lawsuit and assert the specific violations of their rights."[7] The majority approach permits the resolution of issues relating to the same employer and the same consent decree to be addressed in a single lawsuit by a single court having all the interested parties before it, instead of forcing the courts to deal with such issues on a piecemeal basis, as they must under the Eleventh Circuit's approach.

Furthermore, as the other circuits have recognized, a rule encouraging collateral attacks on consent decrees "would mean that the parties to the consent decrees could 'be faced with either inconsistent or

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[6] The requirement that the application be timely is to be applied flexibly in the discretion of the court, and the point to which the litigation has progressed is one factor to be considered by the court in deciding whether to allow intervention, but is not necessarily determinative. *See Culbreath v. Dukakis*, 630 F.2d at 17, and cases there cited. Thus, while intervention has been denied in some instances because, as in this case, the applicants delayed unreasonably, persons seeking to challenge a consent decree after its issuance may still be permitted to intervene for that purpose if, for example, the court concludes that it would not have been reasonable in the circumstances to have expected them to recognize the potential effects of the litigation on their rights at an earlier stage.

[7] *Reeves v. Wilkes*, 754 F.2d 965, 971 (11th Cir. 1985). *See also United States v. Jefferson County*, 720 F.2d 1511, 1518 & n.20 (11th Cir. 1983).

contradictory proceedings.'" *Thaggard v. City of Jackson*, 687 F.2d at 68, quoting *O'Burn v. Shapp*, 70 F.R.D. at 552. Thus, to permit such collateral attacks would "result in continued uncertainty for all parties involved and render the concept of final judgments meaningless." *Thaggard*, 687 F.2d at 69, quoting *Prate v. Freedman*, 430 F. Supp. at 1375.

For these reasons, the circuits following the majority rule have correctly recognized that to allow collateral attacks on consent decrees "would be to thwart the goal of Title VII of encouraging settlement of complaints through voluntary compliance." *Grann v. City of Madison*, 738 F.2d at 796; *Thaggard*, 687 F.2d at 69; *Dennison v. City of Los Angeles*, 658 F.2d at 696. As this Court has emphasized, "Cooperation and voluntary compliance were selected as the preferred means for achieving [Title VII's goal of equality of employment opportunities]." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). *See also Local Number 93 v. City of Cleveland*, 106 S.Ct. 3063, 3072 (1986); *Weise v. Syracuse University*, 522 F.2d 397, 411-12 (2d Cir. 1975); *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 497-98 (5th Cir. 1968). Consent decrees are an important mechanism for implementing that policy.

Indeed, it was in recognition of the "strong preference for encouraging voluntary settlement of employment discrimination claims" that this Court held that a district court's rejection of a proposed consent decree must be treated as an immediately appealable order. *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981). For, as the Court noted, one of the major reasons why parties agree to consent decrees is "to avoid the costs and uncertainties of litigation." Consequently, a court's rejection of such a proposed decree could "have the 'serious, perhaps irreparable, consequence' of denying the parties the right to compromise their dispute on mutually agreeable terms." *Id.* at 87-88. These policy concerns lead to the conclusion that potential challenges to a consent decree should be presented and resolved as expeditiously as possible.

A rule leaving such decrees open to collateral attack would similarly undermine the statutory policy of fostering settlements. For, as several circuits have pointed out, to allow collateral attacks on Title VII consent decrees would effectively place the employer "in the impossible situation of facing suit by minority employees if it fails to correct past discrimination and facing suit by non-minority employees if it corrects past practices." *Grann*, 738 F.2d at 794. "The [employer] would in effect be forced to walk a tightrope. If it refused to enter into the consent decree, it would be potentially liable to the [minority] plaintiffs. If it did enter into the agreement, it would be subject to suits for compensation by non-minority employees." *Dennison*, 658 F.2d at 696.

Title VII, of course, protects non-minorities as well as minorities,[8] and the statutory preference for voluntary settlements should not be implemented in a way that wholly deprives persons or groups who believe their rights have been affected adversely by a consent degree of a forum in which to challenge the decree. But there is no such deprivation where, as here, such persons have been afforded a fair opportunity to intervene in the litigation giving rise to the

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[8] *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976).

consent decree. Rather, in this situation, the forum has been provided in the underlying Title VII litigation, and the manifest practicalities of the situation strongly favor requiring that any such challenge be brought in that forum, rather than a separate lawsuit.

It would not be workable to require joinder under Rule 19, Fed. R. Civ. P., of every person who might claim to be affected by a broad-scale employment discrimination consent decree like the ones in this case. Neither the parties negotiating the decree nor the court would have the means to identify every individual who could potentially assert such an interest. Moreover, even if they could be identified and joined, the sheer number of parties who would then have to be brought before the court in order to settle a complaint of systemic discrimination by a large employer, such as a city or county government or a major corporation, would overwhelm the process.

The approach favored by the majority of the circuits is far more practical and still fully adequate to assure due process to all concerned. It effectively places the initial burden on the parties to the consent decree negotiations to give clear and sufficient notice of the proposed decree to all those whose interests might be affected, and to do so far enough in advance of the decree's final approval so that anyone who so desires can make a timely motion to intervene. Once sufficient notice has been given, it is both fair and sensible to require those who wish to challenge a proposed decree to identify themselves and to make their objections in the context of the same proceedings, rather than to wait and bring a separate attack after the decree has been finalized.

B. Due Process Is Satisfied Where Those Challenging a Consent Decree Have Had Fair Notice and Opportunity to Intervene in the Underlying Title VII Litigation.

The requirements of due process can be satisfied in a variety of ways. What is essential "in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

As discussed above, Rule 24, Fed. R. Civ. P., affords those who fear that their interests may be affected adversely by a Title VII consent decree an "opportunity to present their objections" by moving to intervene in the litigation giving rise to the decree. Thus, as long as they have been given adequate notice of the consent decree and its potential impact on them, the opportunity to intervene should be sufficient to satisfy due process. *See Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 114 (1968) (Suggesting, without deciding, that a nonparty who had purposely bypassed an adequate opportunity to intervene might be bound by a previous decision). Due process does not require that they necessarily be granted their "day in court" in the context of a *separate* lawsuit. *National Wildlife Federation v. Gorsuch*, 744 F.2d 963, 968-72 (3d Cir. 1984).

The Third Circuit's opinion in *National Wildlife Federation* illustrates that a court can be amply sensitive to the due process rights of persons claiming to be affected by a consent decree without granting them an unrestricted right to bring collateral at-

tacks thereon. Thus, the court emphasized that "due process accords a person a day in court" and that ordinarily "a stranger to a lawsuit is not under a duty to intervene," 744 F.2d at 969, but nevertheless concluded that a decree could properly be given preclusive effect against a group that "was aware of the [decree litigation] from the outset, and made a strategic decision not to intervene. . . ." *Id. at* 970.

The record of this case does not support a claim that the district court denied the "reverse discrimination" plaintiffs due process by barring them from using this lawsuit as a vehicle to attack the consent decree setting the underlying *Birmingham* and *Jefferson County* discrimination litigation. Rather, like the plaintiffs in the *National Wildlife Federation* case, the plaintiffs here were afforded ample opportunity to "have . . . their day in court as litigants" but "for reasons of their own adopted a different approach." 744 at 972. They clearly had notice of that litigation and were fully aware of its potential impact on them. Indeed, Attorney Fitzpatrick appeared at the fairness hearing on the proposed decree, and spoke in opposition to the decree on essentially the same grounds he has attempted to raise on their behalf in this collateral proceeding. The "reverse discrimination" plaintiffs also were plainly aware of their right under the federal rules to seek intervention in the underlying Title VII action. Indeed, there has been no contention in this case that any of the plaintiffs in the current actions did not have notice of the consent decree proceedings in time to make a timely motion to intervene therein, had they wished to do so. Yet, "[i]n a deliberate choice of litigation strategy," *id.* at 971, they opted not to move to intervene until after the fairness hearing was over, a time which the district court reasonably concluded was too late.

In sum, the constitutional guarantee of due process requires that persons claiming to be affected by a consent decree be afforded a fair opportunity to present their objections before it is given preclusive effect against them, but it does not require that they be given a choice of proceedings in which to do so. Where, as here, compelling public policy interests weigh heavily in favor of resolving the conflicting interests of all those who stand to be affected by a consent decree in a single proceeding before the same judge, and all persons or groups claiming such interests have been notified and given the chance to participate in that proceeding, the constitutional requirement of due process has been satisfied.

CONCLUSION

For the reasons stated above, amicus curiae EEAC respectfully submits that the decision of the court of appeals allowing this "reverse discrimination" lawsuit to proceed as a collateral attack on the Title VII consent decrees should be reversed.

Respectfully submitted,

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